No. 21-274

IN THE
Supreme Court of the United States

STATE OF OKLAHOMA,

Petitioner,

v.

JOHNNY EDWARD MIZE, II

Respondent.

On Petition for a Writ of Certiorari to the Oklahoma Court of Criminal Appeals

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Did the Oklahoma Court of Criminal Appeals correctly hold that States lack jurisdiction to prosecute crimes by non-Indians against Indians in Indian country, as this Court has repeatedly affirmed and as lower courts uniformly agree?

2. Should this Court consider overruling its statutory decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020)?

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INTRODUCTION

In August 2017, the Tenth Circuit applied this Court's precedents to hold that the Muscogee reservation endured. *Murphy v. Royal*, 875 F.3d 896, 966 (10th Cir. 2017). Immediately, Respondent moved to dismiss his then-pending state-court prosecution. But Oklahoma ignored *Murphy* and tried Respondent anyway. Thereafter, this Court agreed with the Tenth Circuit and, in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), held that Congress never disestablished the Muscogee reservation. What happened next was uncontroversial: The Oklahoma Court of Criminal Appeals ("OCCA") on direct appeal duly voided Respondent's conviction. That accorded with Oklahoma's repeated representations that if the Muscogee reservation persisted, settled law divested it of jurisdiction over "crimes committed against Indians" by non-Indians like Respondent. *McGirt* Arg. Tr. 54.

The OCCA's application of settled law warrants no further review. Oklahoma first told this Court that it must limit or overrule *McGirt* because "[t]housands" of prisoners were poised to successfully "challeng[e] decades' worth of convictions." Pet. 2, *Oklahoma v. Bosse*, No. 21-186. Events, however, removed that premise. After Oklahoma filed for certiorari in *Bosse*, the OCCA issued *State ex rel. Matloff v. Wallace*, 2021 OK CR 21. *Matloff* stated that the OCCA was "interpret[ing] … state post-conviction statutes [to] hold that *McGirt* … shall not apply retroactively to void a conviction that was final when *McGirt* was decided." *Id.* ¶15. So Oklahoma shifted course. Seeking to salvage review, Oklahoma filed a new petition, focusing on

McGirt's consequences for present and future criminal prosecutions and for civil jurisdiction. *Oklahoma v. Castro-Huerta*, No. 21-429. But try as Oklahoma might, the simple facts remain: *McGirt*'s backwards-looking effects are now limited—and its going-forward effects are for Congress to weigh. Today, neither of Oklahoma's questions warrants review.

Oklahoma's first question asks "[w]hether a State has authority to prosecute non-Indians who commit crimes against Indians in Indian country." Pet. i. The OCCA correctly answered no, in a decision implicating no conflict or disagreement. This Court has long affirmed that "the United States, rather than … [the State], ha[s] jurisdiction over offenses committed" in Indian country "by one who is not an Indian against one who is." *Williams v. United States*, 327 U.S. 711, 714 & n.10 (1946). Lower courts uniformly concur. Meanwhile, Congress has repeatedly embedded this understanding in statutes. Oklahoma previously asked this Court to upend that consensus based on *McGirt*'s effects on existing Oklahoma convictions. But again, those effects are now limited—and *Matloff* has reshaped the backdrop against which this Court stayed *Bosse*.

Oklahoma's request to overrule *McGirt* is no more certworthy. Like many of this Court's statutory decisions, *McGirt* was divided. Like many such decisions, *McGirt* had real effects (though Oklahoma vastly overstates them). And like all this Court's statutory decisions, the ball is now where the Constitution has placed it: With Congress.

Certiorari is not warranted to address Oklahoma's invitation for this Court to elbow Congress aside. It

scarcely needs saying that this Court does not overrule statutory decisions based solely on changes in personnel. *Stare decisis* exists precisely to protect the "actual and perceived integrity of the judicial process" against such threats. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014). And *stare decisis* applies with "special force" in statutory cases, where "Congress remains free to alter what [this Court has] done." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274 (2014).

Here, those principles are no mere abstractions. Oklahoma seeks certiorari *in order to* preempt active negotiations. In May 2021, its governor opposed H.R. 3091, which would have allowed the State to compact with two Tribes to obtain its pre-*McGirt* criminal jurisdiction. In July 2021, the State opposed federal-law-enforcement funding because it did not desire "a permanent federal fix."[1] And weeks later, it became clear why: It preferred to swing for the fences here. This Court's place, however, is not in the middle of legislative negotiations. And Oklahoma's siren song that "[o]nly the Court can remedy [its] problems," *Castro-Huerta* Pet. 4, badly misunderstands this Court's role.[2]

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[1] Reese Gorman, *Cole Encourages State-Tribal Relations Over State Challenges to McGirt*, Norman Transcript (July 23, 2021), https://yhoo.it/3lYMjD8.

[2] Because *Castro-Huerta* is Oklahoma's most recent version of its arguments, Respondent addresses that petition. True, it is bizarre for Oklahoma to ask the Court to weigh overruling *McGirt* in a case (like *Castro-Huerta*) concerning the *Cherokee* reservation, a different reservation subject to different treaties and statutes. But that oddity should be of no moment. Oklahoma's questions presented do not warrant review in any case.

Rarely, moreover, will this Court receive so inappropriate a request justified by so little. Despite claiming "unprecedented disruption," *Castro-Huerta* Pet. 10, Oklahoma points to few real effects. Again, *McGirt*'s impact on existing convictions is now limited. And again, going forward, Congress can decide whether to modify jurisdictional lines. Meanwhile, Oklahoma's claims of a "criminal-justice crisis," *Castro-Huerta* Pet. 4, are largely unburdened by evidence and badly misstate the facts. In reality, the federal government and Five Tribes are working to fulfill the responsibilities *McGirt* gives them and seeking the resources they need to do so (often over Oklahoma's opposition).

Oklahoma's claims about civil consequences are even more reality-free. In fact, its position, undisclosed to the Court in its petitions, is that *McGirt* applies *only* to criminal jurisdiction and has *no* civil effects. In all events, moreover, those effects will be vastly less than Oklahoma suggests. And the place to address such concerns is in civil cases—which will make concrete *McGirt*'s (limited) actual consequences. Oklahoma's overwrought claims have no place in this criminal case.

Indeed, Oklahoma's petition is a source of, not a solution to, uncertainty. Overruling *McGirt* would invalidate countless federal and tribal prosecutions and squander tens of millions spent in reliance on *McGirt*. Meanwhile, granting review would freeze negotiations indefinitely. Oklahoma apparently is happy to impose those costs. But that only underscores why its arguments should be directed to Congress, which the Constitution charges with making such decisions.

The petition should be denied.

STATEMENT OF THE CASE

A. *Murphy* and *McGirt*.

The Muscogee reservation came before this Court after a unanimous Tenth Circuit held, in August 2017, that the reservation endured. *Murphy*, 875 F.3d at 966. "Applying *Solem* [*v. Bartlett*, 465 U.S. 463 (1984)]," the panel "conclude[d] Congress has not disestablished the Creek Reservation." Chief Judge Tymkovich explained that, in his view, "Supreme Court precedent preclude[d] any other outcome." *Id.* at 966 (Tymkovich, C.J., concurring in the denial of rehearing en banc).

In *McGirt*, this Court agreed. The bedrock rule, it explained, is that only "Congress can divest a reservation of its land." 140 S. Ct. at 2462 (quoting *Solem*, 465 U.S. at 470). And while "[d]isestablishment has never required any particular form of words," it "does require that Congress clearly express its intent." *Id.* at 2463. Hence, "[o]nce a block of land is set aside for an Indian reservation," it "retains its reservation status until Congress explicitly indicates otherwise." *Id.* at 2468 (quoting *Solem*, 465 U.S. at 470).

The Court found no statute disestablishing the Muscogee reservation. No statute provided for a "cession" to the United States, *id.* at 2462 (quoting *Solem*, 465 U.S. at 470), or "evidenc[ed] the present and total surrender of all tribal interests" *id.* at 2463 (quoting *Nebraska v. Parker*, 577 U.S. 481, 488 (2016))—such as by specifying that the reservation was "discontinued, abolished, or vacated." *Id.* Indeed, Congress had directed negotiators to explore a cession—but "the Creek refused." *Id.* at 2463 n.2.

The Court also addressed the "other ways Congress intruded on the Creek's … self-governance." *Id.* at 2465. These statutes "represented serious blows." *Id.* at 2466. But they "left the [Muscogee] with significant sovereign functions." *Id.* And eventually "Congress changed course" and restored many powers. *Id.* at 2467. Hence, there "arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation." *Id.* at 2468.

The Court declined to accept Oklahoma's invitation to find disestablishment based on "historical practices and demographics." *Id.* at 2468. The Court found "no need to consult extratextual sources when the meaning of a statute's terms is clear." *Id.* at 2469. The Court, however, also addressed Oklahoma's historical arguments on their own terms and found that "none … provide[d]" "'compelling' evidence" of disestablishment. *Id.* at 2470.

Last, the Court considered Oklahoma's "dire warnings" that a "loss" would have "'transform[ative]' effects." *Id.* at 2478, 2481. The Court did not doubt that its decision would have real effects—though it emphasized that many of the problems Oklahoma foretold would be temporary or mitigated by other doctrines. While "federal prosecutors might be initially understaffed and Oklahoma prosecutors initially overstaffed, it doesn't take a lot of imagination to see how things could work out in the end." *Id.* at 2480. The Court acknowledged, too, "reliance interests" but emphasized that "other legal doctrines … are designed to protect" such interests. *Id.* at 2481.

The Court "proceed[ed] well aware of the potential

for cost and conflict." *Id.* But it declined to let "pessimism … rule." *Id.* It emphasized that "[w]ith the passage of time, Oklahoma and its Tribes have proven they can work successfully together," as evident from Oklahoma's "hundreds of intergovernmental agreements with tribes." *Id.* "And, of course, should agreement prove elusive," "Congress remains free to" legislate. *Id.* at 2481-82.

The Chief Justice dissented. He maintained that the Court had misread the relevant statutes and that "Congress disestablished any reservation" before Oklahoma's statehood. *Id.* at 2482 (Roberts, C.J., dissenting). He predicted that the Court's decision would have "destabiliz[ing]" consequences. *Id.* at 2501. And while he shared the hope that "the 'spirit' of cooperation behind existing intergovernmental agreements" would endure, he emphasized that *McGirt* would require more significant agreements. *Id.* at 2502.

B. This Case.

In *Murphy* and *McGirt*, it was common ground that the Court's holding would apply to all crimes involving Indians, whether as defendants or victims. That was because, as Oklahoma explained, "States lack criminal … jurisdiction … if either the defendant or victim is an Indian." *Murphy* Pet. 18. Hence, Oklahoma emphasized that an adverse ruling would invalidate convictions for "crimes committed against Indians" by non-Indians, "which the state would not have jurisdiction over." *McGirt* Arg. Tr. 54.

Below, Respondent timely invoked that law. On July 14, 2017, he was charged with manslaughter in

Oklahoma state court. On August 21, 2017—two weeks after the Tenth Circuit's *Murphy* decision—Respondent moved to dismiss because the alleged crime occurred within the Muscogee reservation and the victim was an Indian. Mot. to Dismiss at 2 (Aug. 21, 2017).[3]

The trial court denied Respondent's motion, and the case proceeded to trial in January 2019. Respondent argued that he had acted in self-defense. The jury, however, convicted Respondent of manslaughter and sentenced him to 25 years.

Respondent timely appealed and reiterated that the State lacked jurisdiction. Br. of Appellant at 20-25 (Aug. 29, 2019).[4] In response, Oklahoma argued that the OCCA should not follow *Murphy*. It conceded, however, that "Oklahoma does not have jurisdiction over crimes committed *by or against an Indian* in Indian country." Br. of Appellee at 35-36 (Dec. 13, 2019) (emphasis added) (quoting *State v. Klindt*, 1989 OK CR 75, ¶ 3).

After *McGirt*, the OCCA remanded for a hearing on "(a) the Indian status of [the] victim … and (b) whether the crime occurred within the boundaries of the Muscogee Creek Reservation." Pet. App. 2a. The parties stipulated that both answers were yes. Pet. App. 3a. Only then did Oklahoma reverse itself and claim "concurrent jurisdiction … over crimes committed by non-Indian defendants against Indian victims." *Id.* Respondent argued that this claim was waived and

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[3] All references to district-court filings are to Case No. CF-2017-3891, available at https://bit.ly/3teFYVz.

[4] All references to OCCA filings are to Case No. F-2019-68, available at https://bit.ly/3kTbNzA.

meritless. Appellant's Supp. Br. 4-9 (Dec. 14, 2020).

The OCCA observed that it had "rejected the State's argument regarding concurrent jurisdiction in *Bosse*," and rejected it again. Pet. App. 3a-4a. It thus held that Oklahoma "did not have jurisdiction to prosecute" Respondent and vacated his conviction. Pet. App. 4a.

Although the OCCA subsequently vacated *Bosse*, the OCCA again "reject[ed] the State's concurrent jurisdiction argument" in *Roth v. State*, 2021 OK CR 27. *Roth* observed that the rule of "exclusive" federal jurisdiction "is well established." *Id.* ¶ 13. And it explained that "Congress has authorized States to assume criminal jurisdiction over Indian Country in limited circumstances" but that Oklahoma never received such jurisdiction. *Id.* ¶ 14.

By the time the OCCA decided Respondent's case, the federal government had already indicted Respondent, Indictment at 1 (Mar. 24, 2021), ECF No. 2,[5] and it duly took Respondent into custody, Arrest Warrant at 1 (Apr. 29, 2021), ECF No. 20. Trial is scheduled for December 20, 2021. Order at 3 (May 20, 2021), ECF No. 27.

[5] References to filings in Respondent's federal criminal case are to No. 4:21-cr-00107 (N.D. Okla.).

REASONS FOR DENYING THE PETITION

I. This Court Should Not Grant Certiorari On Oklahoma's Concurrent-Jurisdiction Argument.

The OCCA correctly held that States lack jurisdiction to try non-Indians for crimes against Indians in Indian country. That decision accords with this Court's cases (which uniformly affirm this rule), lower-court decisions (which uniformly follow this rule), and Congress's statutes (which uniformly endorse this rule)—as well as Oklahoma's repeated representations that "States lack … jurisdiction … if either the defendant or victim is an Indian." *Supra* 7. Further review is not warranted.

A. The OCCA's Holding Does Not Warrant Review.

Oklahoma barely tries to show that its first question presented warrants review. It does not. Oklahoma does not claim lower courts are divided. To the contrary, they uniformly hold that "federal courts have exclusive jurisdiction over an offense committed in Indian country by a non-Indian against … an Indian." *State v. Larson*, 455 N.W.2d 600, 601 (S.D. 1990).[6]

Nor, even, can Oklahoma claim a conflict with this Court's cases. For decades and without exception, this

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[6] *See State v. Flint*, 756 P.2d 324, 326 (Ariz. Ct. App. 1988); *State v. Greenwalt*, 663 P.2d 1178, 1182 (Mont. 1983); *State v. Kuntz*, 66 N.W.2d 531, 532 (N.D. 1954); *accord United States v. Bruce*, 394 F.3d 1215, 1221-22 (9th Cir. 2005); *St. Cloud v. United States*, 702 F. Supp. 1456, 1459 (D.S.D. 1988).

Court has affirmed that "the United States, rather than … [the State], ha[s] jurisdiction over offenses committed" in Indian country "by one who is not an Indian against one who is." *Williams*, 327 U.S. at 714 & n.10. Its seminal Indian-country jurisdictional decision, *Williams v. Lee*, 358 U.S. 217 (1959), reiterated that "if [a] crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive." *Id.* at 220. And the Court reaffirmed the same rule in *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979), which explained that "criminal offenses by or against Indians have been subject only to federal or tribal laws, except where Congress … has 'expressly provided that State laws shall apply.'" *Id.* at 470-71. The list could, and does, go on. *See* 20A161 U.S. Br. 16-19 (more examples).

In *Bosse*, Oklahoma sought and obtained a stay based on representations that "thousands" of prisoners were poised to unwind "decades of past convictions" because the OCCA had "prohibited the State from imposing … post-conviction procedural bars." 20A161 Okla. Br. 1-2, 11. After *Matloff*, however, *McGirt* affects only existing criminal convictions on direct review—and Oklahoma's first question presented affects only the small subset of cases in which the victim was Indian but the defendant is not. Respondent knows of only *12* such cases before the OCCA. Going forward, too, this issue is of marginal importance: Oklahoma has estimated that only 20% of cases affected by *McGirt* involve non-Indian defendants. 20A161 Okla. Br. 17. So its claims about *McGirt*'s effects on criminal jurisdiction—overwrought as they are, *infra*

Part II.B.2—have little to do with this issue.

More important, Congress is the place to address going-forward jurisdiction. For decades, States, the United States, and Tribes have shared a common understanding: States have jurisdiction over crimes by non-Indians against Indians in Indian country only if Congress expressly confers it. Hence, where Congress has *not* done so, non-Indians are subject to federal punishments and prosecutorial choices, not the different punishments and choices States might inflict. If Oklahoma believes it needs additional jurisdiction, Congress can pass a bespoke law. Indeed, H.R. 3091 would allow it jurisdiction over crimes "by or against Indians" within two of the Five Tribes' reservations. H.R. 3091 § 6(b)(1), 117th Cong. (introduced May 11, 2021). Certiorari is not warranted so this Court can insert itself into legislative back-and-forth and disrupt settled understandings nationwide.

B. The Decision Below Is Correct.

1. The rule the OCCA applied, which this Court has so often affirmed, is correct: States have criminal jurisdiction over offenses involving Indians only if Congress has expressly conferred it. "Congress has … acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *Williams*, 358 U.S. at 220. Hence, this Court's preemption analysis "gives effect to the plenary and exclusive power of the Federal Government to deal with Indian tribes" and "regulate and protect the Indians and the property against interference." *Bryan*

v. Itasca Cnty., 426 U.S. 373, 376 n.2 (1976); *accord Roth*, 2021 OK CR 27, ¶ 14.

Congress's criminal-jurisdiction statutes embody that assumption. In 1940, Congress granted Kansas "[j]urisdiction … over offenses committed by or against Indians on Indian reservations." 18 U.S.C. § 3243. This Court and Congress understood the Kansas Act as "the first major grant of jurisdiction to a State over offenses *involving Indians* committed in Indian country." *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993) (emphasis added). But it was not the last. Statutes with near-identical language quickly followed for North Dakota, Iowa, and New York, all conferring jurisdiction over "offenses by or against Indians."[7] In Public Law 280, Congress conferred the same jurisdiction on more States and gave the option to assume such jurisdiction to any other "State *not having jurisdiction* over criminal offenses committed by or against Indians" in Indian country. 25 U.S.C. § 1321(a)(1) (emphasis added); Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, §§ 2, 7, 67 Stat. 588. Each statute reflects the same rule the OCCA applied below: Absent a statute, States lack jurisdiction over crimes by non-Indians "against Indians."

2. The OCCA correctly rejected Oklahoma's contrary position. Oklahoma seeks a nontextual extension of *United States v. McBratney*, 104 U.S. 621 (1882), which held that States have jurisdiction over crimes by non-Indians against non-Indians. *Id.* at 624. In *Draper v.*

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[7] *See* Act of May 31, 1946, ch. 279, 60 Stat. 229; Act of June 30, 1948, ch. 759, 62 Stat. 1161; Act of July 2, 1948, ch. 809, 62 Stat. 1224; Act of Oct. 5, 1949, ch. 604, 63 Stat. 705.

United States, this Court recognized that *McBratney* was hard to square with Montana's statehood act, which stipulated that "Indian lands shall remain under the absolute jurisdiction and control of … the United States." 164 U.S. 240, 244 (1896) (quoting 25 Stat. 676). *Draper* nonetheless found that the "equality of statehood" principle compelled *McBratney*'s rule. *Id.* But it limited *McBratney* to crimes not committed by "Indians or against Indians." *Id.* at 247. The Court held the same in *Donnelly v. United States*, which reiterated "[u]pon full consideration" that the Court was "satisfied that offenses committed *by or against Indians* are not within the principle of … *McBratney*." 228 U.S. 243, 271 (1913) (emphasis added). For a century, this Court has adhered to that view, which the OCCA correctly followed.

3. The text and context of the General Crimes Act confirm that, outside *McBratney*'s nontextual exception, States lack criminal jurisdiction in Indian country. The Act "extend[s]" federal criminal jurisdiction "to the Indian country" by applying the federal laws that apply "any place within the *sole and exclusive* jurisdiction of the United States." 18 U.S.C. § 1152 (emphasis added). As the Solicitor General has explained, the italicized phrase indicates that Congress understood Indian country to parallel federal enclaves—where the federal government "exercise[s] exclusive" jurisdiction and state criminal laws are inapplicable. 20A161 U.S. Br. 11; *see* U.S. Const. art. I, § 8, cl. 17.[8]

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[8] Oklahoma invokes *Donnelly*'s statement that "[t]he words 'sole and exclusive'" in the General Crimes Act "do not apply to the

Moreover, Congress first enacted the General Crimes Act in 1834, when *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), was hot off the presses. Intercourse Act, June 30, 1834 § 25, ch. 161, 4 Stat. 729. *Worcester* "reflected the view that Indian Tribes were wholly distinct nations within whose boundaries 'the laws of [a State] can have no force.'" *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331 (1983) (quoting *Worcester*, 31 U.S. (6 Pet.) at 561). This Court construes statutes according to their "original public meaning." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2075 (2018). And those who enacted the General Crimes Act understood federal law to provide the exclusive means of punishing Indian-country crimes by non-Indians against Indians.

4. Congress embedded the same understanding in statute many times since. First, after *Draper* limited *McBratney* to crimes not "by … Indians or against Indians," 164 U.S. at 244-45, Congress in 1906 enacted the Oklahoma Enabling Act using language that was near-identical to the Montana act that *Draper* construed.

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jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it." 228 U.S. at 268. *Donnelly*, however, made that statement in rejecting the argument that the Major Crimes Act, by vesting some jurisdiction in territorial courts, displaced the General Crimes Act by rendering federal jurisdiction no longer "sole and exclusive." *Id.*; *accord Ex parte Wilson*, 140 U.S. 575, 578 (1891). That statement did not address whether the General Crimes Act preempts state criminal jurisdiction—and indeed, *Donnelly* elsewhere reaffirmed that States lack jurisdiction in Indian country over crimes by or against Indians. *Supra* 14.

Act of June 16, 1906, ch. 3335, § 25, 34 Stat. 267. Second, in 1948, just two years after *Williams* reiterated that States lack jurisdiction over crimes "by one who is not an Indian against one who is," 327 U.S. at 714 & n.10, Congress reenacted the General Crimes Act. Act of June 25, 1948, Pub. L. No. 80-772, ch. 645, § 1152, 62 Stat. 683, 757. And third, shortly after that, Congress enacted Public Law 280 and all the statutes detailed above recognizing that, absent a statute, States lack jurisdiction over crimes "by or against" Indians.[9] When this Court's cases have established a provision's meaning and effect, it "presume[s] that when Congress reenact[s] the same language …, it adopt[s] the earlier judicial construction." *Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, 139 S. Ct. 628, 633-34 (2019).

5. Oklahoma incorrectly claims that "the Court's modern precedents demonstrate that" state jurisdiction broadly extends to "interactions between non-Indians and Indians." *Castro-Huerta* Pet. 15-16. Its citations, however, mostly concern tax collection. *See id.*

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[9] Oklahoma shrugs off Public Law 280 by claiming that it is "at best overinclusive, because" it also confers civil jurisdiction and "States already possess civil jurisdiction in cases involving non-Indian defendants." *Castro-Huerta* Pet. 17. But that is no answer to how Oklahoma's position renders *superfluous* Public Law 280's grant of "criminal jurisdiction over criminal offenses committed by *or against* Indians." 25 U.S.C. § 1321(a) (emphasis added). In the civil provision, by contrast, no words are superfluous. It bestows jurisdiction "over civil causes of action between Indians or to which Indians are parties," *id.* § 1322(a), and so grants authority over Indian defendants otherwise beyond States' reach. While Congress could have drafted more narrowly, every word does work.

(discussing *Milhelm*, *Yakima*, *Potawatomi*, *Cotton Petroleum*, *Colville*, *Moe*).[10] None was about criminal jurisdiction. Oklahoma also cites *New York ex rel. Cutler v. Dibble*, 62 U.S. (21 How.) 366 (1858). But *Dibble* upheld a *civil* ejectment statute for the removal of non-Indians from Indian lands, not a criminal statute. *Id.* at 371.

Alternatively, Oklahoma urges application of the *Bracker* balancing test. *Castro-Huerta* Pet. 15. Respondent maintains that the statutes govern. But that disagreement scarcely matters: When *Bracker* balances "state, federal and tribal interests," it does not undertake an ad hoc weighing of policy arguments. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980). It is guided by "the language of the relevant federal treaties and statutes." *Id.* Here, Congress in the General Crimes Act treated Indian country as equivalent to locations "within the sole and exclusive jurisdiction of the United States"; enacted that language on the understanding that it provided the full measure of criminal jurisdiction in Indian country; reenacted it after this Court affirmed that federal

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[10] The exception is *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 148-49 (1984), which concerns state jurisdiction over suits by Indians against non-Indians. In *Bosse*, Oklahoma analogized this case to such suits. 20A161 Okla. Br. 20-21. But the civil context differs in a critical respect. There, Indians voluntarily enter state courts as private persons. Here, Oklahoma proceeds as the sovereign enforcer of public laws, in derogation of the "plenary and exclusive power of the Federal Government … to regulate and protect the Indians." *Bryan*, 426 U.S. at 376 n.2.

jurisdiction is exclusive; and enacted myriad statutes conferring jurisdiction over crimes "by or against Indians"—which become nonsense if States already have such jurisdiction.

Oklahoma's core *Bracker* argument—that concurrent jurisdiction would "enhanc[e] the protection of Indians from the crimes of non-Indians," *Castro-Huerta* Pet. 16—is debatable even as a policy argument. States are notoriously derelict in protecting Indians in Indian country even where they have jurisdiction.[11] The critical point, however, is this: The relevant Congresses did not share Oklahoma's policy judgment. They shared the understanding of *Donnelly*: that "Indian tribes are the wards of the Nation" (*i.e.*, the federal government) and that the federal government has responsibility to prosecute "crimes committed by white men against the[ir] persons or property … while occupying reservations set apart for … segregating them." 228 U.S. at 272. *Donnelly*, in turn, reflected countless treaties embedding the same rule. For example, the federal government promised that it—and no one else—would "protect the Creeks … from aggression by … white persons, not subject to their jurisdiction," even as it vowed that "no State … shall ever pass laws for the government of the Creek" reservation. Treaty with the Creeks, Aug. 7, 1856, Arts. 4, 18, 11 Stat. 699

Congress thus vested in the United States responsibility to determine whether, and how, to

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[11] *E.g.*, Matthew L.M. Fletcher, *Addressing the Epidemic of Domestic Violence in Indian Country by Restoring Tribal Sovereignty*, Am. Const. Soc'y (Mar. 2009), https://bit.ly/2ZyNdwT.

prosecute crimes by non-Indians against Indians in Indian country. Oklahoma cannot override that judgment by asserting that state prosecutions are wise. Indeed, the entire *premise* of its pragmatic argument is that if it prosecutes non-Indians, the federal government can shirk its duties. That is not the system Congress's statutes contemplate.

C. Certiorari Is Unwarranted Because This Issue Is Not Outcome-Determinative.

Certiorari is also unwarranted because the answer to Oklahoma's question presented is not outcome-determinative. As explained, Oklahoma affirmatively waived its concurrent-jurisdiction argument by representing during Respondent's appeal that "Oklahoma does not have jurisdiction over crimes committed *by or against an Indian* in Indian country." Br. of Appellee at 35-36 (Dec. 13, 2019) (emphasis added) (quoting *Klindt*, 1989 OK CR 75, ¶ 3). Under Oklahoma law, "the State, like defendants, must … preserve errors …, otherwise they are waived." *A.J.B. v. State*, 1999 OK CR 50, ¶ 9. So whatever the answer to Oklahoma's question presented *in general*, the decision below reached the correct result.[12]

II. This Court Should Not Grant Certiorari To Consider Overruling *McGirt*.

Rarely will this Court receive as audacious a request, justified by so little, as Oklahoma's request to overrule

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[12] To Respondent's knowledge, in no case did Oklahoma make its concurrent-jurisdiction argument before *McGirt*.

McGirt. If Oklahoma objects to *McGirt*'s statutory holding, it must take its case to Congress. It may wish that Congress were speedier, or more pliant. But under our separation of powers, it is for Congress to decide whether and how to respond to *McGirt*.

A. Oklahoma's Petition Asks This Court To Usurp Congress's Role.

1. Respondent will not dwell on the point that *McGirt* was correct. *McGirt* canvassed the governing treaties and statutes, assessed whether any disestablished the Muscogee reservation, and—finding none did—held that the reservation endured. 140 S. Ct. at 2463-68. Oklahoma maintains that *McGirt* should have given greater "[c]onsideration [to] history." *Castro-Huerta Pet.* 17-18. But the majority addressed Oklahoma's historical arguments and found that "even taken on [their] own terms," they did not show disestablishment. 140 S. Ct. at 2470. And while Oklahoma avers that *McGirt* "did not itself adhere to the Court's prior precedents," *Castro-Huerta* Pet. 28, the result *McGirt* reached accords with this Court's normal approach to statutory interpretation (where text is the lodestar of meaning, *e.g.*, *Van Buren v. United States*, 141 S. Ct. 1648, 1654 (2021)), its recent unanimous decision in *Nebraska v. Parker*, 577 U.S. 481, 490 (2016) (which declined to allow "mixed historical evidence" to overcome lack of clear text), and the rule that disestablishment "will not be lightly inferred" and that treaties and statutes must be construed in favor of tribal rights, *Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

2. Today the key point is *stare decisis*. *Stare decisis* "is a foundation stone to the rule of law." *Bay Mills*, 572

U.S. at 798. It "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). It also provides the "means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). And *stare decisis* carries "special force" in statutory cases, where "Congress remains free to alter what [this Court has] done." *Erica P. John Fund*, 573 U.S. at 274.

In statutory cases, *stare decisis* protects not just this Court's "actual and perceived integrity," *Bay Mills*, 572 U.S. at 798, but the separation of powers. This Court does not always speak with one voice about what statutes mean. But once the Court speaks, it is for Congress to decide whether to act. In this realm above all, the "question … is not whether [a prior decision] was right or wrong." *June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103, 2133 (2020) (Roberts, C.J., concurring in the judgment).[13]

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[13] Respondent recognizes that the *McGirt* majority and dissent disagreed over which result better accorded with this Court's precedents. But if such good-faith disagreement rendered *stare decisis* inapplicable in a statutory case, the doctrine would lose all meaning. True, in *constitutional* cases, "[r]emaining true to an 'intrinsically sounder' doctrine established in prior cases" sometimes "'better serves the values of *stare decisis* than would following' [a] recent departure." *June Med.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring in the judgment). That is because only the Court can change constitutional decisions. In statutory cases,

Few petitions so disdain the special values *stare decisis* protects in statutory cases. Oklahoma asks this Court to discard precedent, based on a change in personnel, *so that* it can avoid negotiating over legislation. Oklahoma complains that, one year after *McGirt*, it has not yet reached agreement with the Five Tribes and Congress has not yet acted. *Castro-Huerta* Pet. 26-28. That, however, is neither surprising nor any reason to abandon *stare decisis*. Inter-sovereign negotiations always take time. Legislation does too. When that process does not immediately yield one side's desired outcome, it often blames the other (as Oklahoma does here, *Castro-Huerta* Pet. 26-27). This Court does not respond by taking up the legislative pen and succumbing to calls that "[o]nly the Court can remedy the problem[]." *Castro-Huerta* Pet. 4.

Oklahoma's one-sided account certainly provides no reason for the Court to substitute itself for Congress. Oklahoma suggests, for example, that the Five Tribes have opposed negotiations. *Castro-Huerta* Pet. 27. But it cites just one statement from the Choctaw Nation, which did not oppose negotiations *generally* but maintained that it should "be the federal government that we … talk[] to."[14] Meanwhile, the Cherokee and Chickasaw Nations have both agreed to federal legislation that would allow Oklahoma to reacquire its

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however, *stare decisis* leaves to Congress the decision whether to amend its statutes. *Erica P. John Fund*, 573 U.S. at 274.

[14] Kylee Dedmon, *Choctaw Nation Chief Opposes Oklahoma Governor On Tribal Negotiations*, News12 (Jan. 29, 2021), https://bit.ly/3kY3pAh.

pre-*McGirt* criminal jurisdiction—which Oklahoma has opposed. *Supra* 3, 12. And the Muscogee Nation reports that it has extended to Oklahoma "an open invitation to … partner … to address criminal jurisdiction … but that [the governor]" has refused.[15]

That may have something to do with Oklahoma's negotiating position—which is that "we need to overturn *McGirt* completely."[16] With that position, it is small wonder that Oklahoma has found agreements elusive. Indeed, Oklahoma appears to be more interested in furthering its litigating positions than in reaching accommodations:

- Oklahoma opposed "a permanent federal fix" from Congress. *Supra* 3. Weeks later, it filed petitions seeking *McGirt*'s overruling.
- Oklahoma opposed additional funding for federal law enforcement.[17] Today, it tells this Court that *McGirt* must be limited or overruled because the federal government "lacks [adequate] capacity and resources." *Castro-Huerta* Pet. 16.
- Oklahoma has proclaimed it will not "engag[e] in discussions" on agreements on civil matters and

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[15] Kolby Kickingwoman, *Oklahoma Tribes, Governor Still at Odds Over* McGirt, Indian Country Today (Sept. 5, 2021), https://bit.ly/3D0Pj7f.

[16] Joe Tomlinson & Tres Savage, *Forum Ends Early, Stitt Aims To Overturn* McGirt *Ruling*, Non Doc (July 14, 2021), https://bit.ly/3F5OHiB.

[17] Gorman, Norman Transcript, *supra*, note 1.

> will not "negotiate its sovereignty away" by compromising its position that *McGirt* has *no* civil effects.[18] Now, Oklahoma invokes potential civil effects as a reason *McGirt* must be overruled and tells this Court that "there is no realistic likelihood of" negotiated resolution. *Castro-Huerta* Pet. 24, 26.

Oklahoma is welcome to stick to its guns. The Court, however, should not be fooled by Oklahoma's attempt to launder its hardline position into evidence that legislation is unobtainable. The Court should instead leave these issues where they belong: With Congress.

B. Oklahoma's Claims About *McGirt*'s Consequences Wither Upon Scrutiny.

To tempt the Court to substitute itself for Congress, Oklahoma fills its brief with overwrought claims about consequences. That *McGirt* has created *some* "disruption," *Castro-Huerta* Pet. 4, is neither surprising nor any basis to abandon *stare decisis*. Every Justice recognized that *McGirt* would have real effects. And regardless, Oklahoma's rhetoric rests on makeweight and misdirection.

1. The OCCA Has Limited McGirt*'s Backwards-Looking Effects.*

In *Bosse*, Oklahoma invited the Court to abandon *stare decisis* largely because of *McGirt*'s effects on existing convictions. *Bosse* Pet. 3. Today, however, those effects are limited to the minimum that everyone

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[18] Ray Carter, McGirt *Called Threat to State's Economic Future*, OCPA (Aug. 16, 2021), https://bit.ly/3omQ8U2.

understood would *inevitably* occur. The Chief Justice feared *McGirt* would invalidate many long-final convictions. 140 S. Ct. at 2500-01 & n.9 (Roberts, C.J., dissenting). The majority acknowledged the possibility. *Id.* at 2481. Oklahoma, for its part, warned (without evidence) that an adverse result would free "over 3,000 inmates." *McGirt* Arg. Tr. 54.

The reality came in at the bottom end. Even before *Matloff*, Oklahoma's warnings proved as untrue as they were unsupported: A year after *McGirt*, just "150 prisoners" had obtained relief. *Bosse* Pet. 23.[19] And now, *McGirt* affects only the cases that it always *had* to affect: direct-review cases. To Respondent's knowledge, only about 60 such cases have been decided by, or are pending before, the OCCA—which is far fewer convictions than this Court's decisions regularly affect. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1406 (2020) (recognizing that decision would affect "hundreds" of cases and citing decisions with greater effects). This modest set, moreover, includes many that Oklahoma prosecuted after the Tenth Circuit's *Murphy* decision, which the State understood might be invalid. In such cases, too, retrial is easiest and least likely to face obstacles from time bars or stale evidence. Indeed, Oklahoma's many petitions fail to mention the federal and tribal prosecutions that are *comprehensively* occurring in those cases—and the federal government has already

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[19] *Accord* Cecily Hilleary, *Native Americans, State Leaders Grapple With Legal Uncertainty In Oklahoma*, VOA News (July 31, 2021), https://bit.ly/3F8X0tO.

obtained convictions in several such cases[20] (as it convicted Jimcy McGirt and Patrick Murphy[21]).

There is nothing to Oklahoma's attempts to paper over how *Matloff* removed its premise for seeking review. First, it says that "defendants in approximately 6,000 pending criminal cases are seeking dismissal under *McGirt*." *Castro-Huerta* Pet. 19. That citation-free number, however, is the same one it offered in *Bosse*, which clearly included post-conviction cases. *Bosse* Pet. 25. Second, Oklahoma avers that the *Matloff* defendant may seek certiorari (and indeed, such a petition has now been filed). *Castro-Huerta* Pet. 22; *see Parish v. Oklahoma*, No. 21-467. But that just spotlights the speculation filling Oklahoma's petition: *Matloff* will remain the law unless this Court both grants that petition and reverses. Oklahoma surely will vigorously oppose attempts to set aside *Matloff*—and regardless, the place to consider *McGirt*'s effects on state post-conviction cases are post-conviction cases *actually raising* that issue. Third, Oklahoma says prisoners may "seek relief in federal habeas." *Id.* But again, it is hiding the ball: It previously told this Court that "the Tenth Circuit … has specifically held … that prisoners seeking postconviction relief under … *McGirt* are subject to …

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[20] *E.g.*, *United States v. Kepler*, No. 20-cr-276 (N.D. Okla.); *United States v. Mitchell*, No. 20-cr-254 (N.D. Okla.).

[21] Staff Reports, *McGirt Gets Three Life Sentences for Assaulting Child*, Tahlequah Daily Press, Yahoo News (Aug. 26, 2021), https://yhoo.it/3kXPkmp; Press Release, Dep't of Justice, *Patrick Dwayne Murphy Found Guilty By Federal Jury* (Aug. 5, 2021), https://bit.ly/3zWUOC6.

procedural bars." *Bosse* Pet. 11-12 (citing cases).

Last, Oklahoma claims that "some" direct-review cases may face federal limitations issues. *Castro-Huerta* Pet. 23. But it cites just one example—and there, the OCCA averred that "the timely filing of the charges in state court tolled … any statute of limitations." *Roth*, 2021 OK CR 27, ¶ 17 n.5; *see United States v. Midgley*, 142 F.3d 174, 178-79 (3d Cir. 1998). Indeed, tolling aside, it is no wonder Oklahoma struggled to find examples: The general federal statute of limitations is five years, and many crimes have longer (or no) limitations periods, including offenses punishable by death, as well as arson and child abduction and sex offenses.[22] Meanwhile, if a few direct-review cases face obstacles, it will be because Oklahoma failed to take reasonable steps. *Roth*, for example, unquestionably remained timely in November 2018, *see Roth*, 2021 OK CR 27, ¶ 3, more than a year after the Tenth Circuit's *Murphy* decision. Oklahoma could have worked with the United States to address the obvious risk that this Court might agree with the Tenth Circuit—and if it did not, that is no reason to forsake *stare decisis*.

2. There Is No Crisis Concerning Going-Forward Criminal Jurisdiction, Which Congress Can Address.

Going forward, criminal jurisdiction in Oklahoma is for Congress to address. And regardless, Oklahoma's claims of a "crisis," *Castro-Huerta* Pet. 4, are

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[22] Charles Doyle, Cong. Rsch. Serv., RL31253, *Statute of Limitation in Federal Criminal Cases: An Overview* 2-3 (Nov. 14, 2017).

unsupported. Cross-deputization agreements are ensuring that on-the-ground policing continues uninterrupted. The Muscogee Nation has doubled both the size of its police force and its number of cross-deputization agreements.[23] The Cherokee Nation now has "cross deputization agreements with every single law enforcement on the reservation."[24] The Choctaw Nation, too, "cross-deputized 794 officers in 54 agencies."[25]

As for prosecutions, the federal government is prosecuting major crimes by Indians and crimes by non-Indians against Indians. And the Court need not take Respondent's word for it: After U.S. Attorney Trent Shores left following the change in administrations, he explained that he had heard many "'Chicken Little' comments" but what "we see in actuality is that the sky isn't falling" thanks to the "great partnerships among state, tribal and federal law enforcement entities."[26] Yes, the federal government requires greater resources. But the Department of Justice is seeking from Congress the resources it needs to "support … effective prosecution"

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[23] Naomi Keitt, *Lighthorse Police Budget Increased as Their Caseload Expands*, FOX23 News (Apr. 15, 2021), https://bit.ly/2Wph5KW.

[24] Austin Breasette, *Tribal Attorneys Discuss Changes Within Tribes 13 Months After* McGirt *Ruling*, KFOR (Aug. 17, 2021), https://bit.ly/2Wq7wvh.

[25] *Id.*

[26] Allison Herrera, *Trent Shores Reflects on His Time As U.S. Attorney, Remains Committed To Justice For Indian Country*, NPR (Feb. 24, 2021), https://bit.ly/3D1PbUW.

and "an enhanced presence."[27] So is the judiciary.[28]

When the federal government completes that transition, the result will be different but not unusual. Eastern Oklahoma used to be among the smallest districts.[29] Now, the FBI projects that, by 2023, the Eastern District will see 2,500 criminal filings annually.[30] That is a significant change. But it will leave the Eastern District's criminal docket smaller than the Western District of Texas (7,352 filings), Southern District of California (4,427), or the District of Arizona (4,643)—another district with a large Indian population.[31] And that is to say nothing of the District of Columbia, where (unlike in Oklahoma) the U.S. Attorney's Office prosecutes all serious local crimes.[32]

Although that change will not happen overnight, Oklahoma's claims of an "emergency" today, *Castro-*

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[27] *Federal Bureau of Investigation Budget Request for Fiscal Year 2022: Hearing Before the Subcomm. on Commerce, Justice, Science, and Related Agencies of the S. Comm. on Appropriations*, 117th Cong. 14 (June 23, 2021) (statement of Christopher A. Wray, FBI Director), https://bit.ly/3iut2H4.

[28] U.S. Judicial Conference, Judiciary Supplements Judgeship Request, Prioritizes Courthouse Projects (Sept. 28, 2021), https://bit.ly/3mgiEno.

[29] Federal Court Management Statistics, *U.S. District Court — Judicial Caseload Profile* at 83 (June 2020), https://bit.ly/2Wo2q2w.

[30] Statement of Christopher A. Wray, *supra*, note 25, at 13.

[31] Federal Court Management Statistics, *supra*, note 26.

[32] *See* Dep't of Justice, *United States Attorneys' Annual Statistical Report: Fiscal Year 2020*, at 65 (2020), https://bit.ly/3sHYJ3E.

Huerta Pet. 21, are pure atmospherics. Many U.S. judicial districts have declared an emergency due to the COVID-19 pandemic, with *McGirt* merely presenting an extra challenge.[33] Meanwhile, not a single citation accompanies Oklahoma's claim that Oklahoma's U.S. Attorneys' offices "are resorting to unprecedented triage" and prosecuting only crimes involving "serious bodily injury." *Castro-Huerta* Pet. 20. Oklahoma has a bad track record with such citation-free testifying (like its claims that *McGirt* would free "over 3,000 inmates," *supra* 25). And its most recent unsworn testifying looks no more credible. Federal authorities have publicly announced indictments for offenses not involving serious injury, including "burglary," "firearm violations," "robbery," stalking, "larceny of a motor vehicle," "possession of stolen vehicle," and evading arrest.[34]

Meanwhile, the Fives Tribes are prosecuting crimes by Indians carrying up to nine years' cumulative imprisonment. 25 U.S.C. § 1302(a)(7)(D). They are also prosecuting non-Indians under the Violence Against Women Act. *Id.* § 1304. Indeed, Oklahoma does not actually claim that any problem exists on the tribal side;

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[33] United States Courts, *Court Orders & Updates During COVID-19 Pandemic*, https://bit.ly/3zZZ43I (last updated Sept. 16, 2021).

[34] Press Release, U.S. Attorneys, Eastern District of Oklahoma, *United States Attorney's Office For The Eastern District Of Oklahoma Obtains Twenty-Eight Indictments From Federal Grand Juries* (Aug. 2, 2021), https://bit.ly/3B0k63m; Press Release, U.S. Attorneys, Northern District of Oklahoma, *Federal Grand Jury A Indictments Announced* (Oct. 8, 2020), https://bit.ly/3AYMlzp.

it just complains that the Muscogee Nation has "declined [its] requests to share" information. *Castro-Huerta* Pet. 21. Public information, however, details the great strides the Five Tribes have made. Just this year, the Cherokee Nation has added 13 marshals, six prosecutors, and two district judges, while filing more than 1,200 criminal cases.[35] And since the OCCA recognized the Chickasaw reservation in March 2021, the Chickasaw Nation has added a dozen police officers, responded to 15,728 calls for assistance, made 1,037 arrests on 1,663 charges, and filed 678 criminal cases.[36]

All of this also underscores how much disruption overruling *McGirt* today would inflict. *McGirt* invited—indeed, demanded—reliance by the federal government and the Five Tribes, which had to restructure their budgets and governments to fulfill the greater responsibilities *McGirt* conferred. Now, overruling *McGirt* would pull out the rug. It would squander tens of millions of dollars that the federal government and Five Tribes have invested.[37] And it would invalidate thousands of prosecutions in tribal and federal court.

Oklahoma is thus badly wrong when it claims that

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[35] Samantha Vicent, *Cherokee Nation Highlights Expansion of Legal System on Anniversary of* McGirt *Ruling*, Tulsa World (July 10, 2021), https://bit.ly/2WsCrav.

[36] Press Release, Chickasaw Nation, *Chickasaw Nation Committed to Public Safety and Effective Law Enforcement* (Aug. 4, 2021), https://bit.ly/39Umm0a.

[37] Curtis Killman, *Here's How Cherokee Tribal Courts Are Handling the Surge in Cases Due to the* McGirt *Ruling*, Tulsa World (May 17, 2021), https://bit.ly/2ZBb92G.

stare decisis should carry less weight because *McGirt* has engendered few "reliance interests." *Castro-Huerta* Pet. 28. And its fallback suggestion that those interests "pale in comparison" with its own, *id.*, only underscores that Oklahoma should take its complaints to Congress. If Congress concludes that *McGirt* warrants changes to jurisdictional lines, then Congress—unlike this Court—can accommodate the reliance interests on all sides.

3. Oklahoma's Claims About Civil Consequences Are Filled With Misdirection And Have No Place In This Criminal Case.

Oklahoma fares even worse with its claim that *McGirt*'s potential consequences for "civil authority," *Castro-Huerta* Pet. 23-24, justify jettisoning *stare decisis*. This criminal case does not present those consequences—which remain hypothetical at best and which will be far less than Oklahoma suggests.

a. Oklahoma's position, undisclosed to this Court, is that *McGirt* "does not extend outside of th[e] limited federal criminal context." Compl. at 3, *Oklahoma v. Dep't of Interior*, No. CIV-21-719 (W.D. Okla. July 16, 2021), ECF No. 1. No lower court has addressed that argument. And so long as that question remains open, Oklahoma's claims about civil consequences are grossly premature. Nor will that question take long to percolate. Oklahoma has sought a preliminary injunction based on that argument in federal court, which will promptly generate an as-of-right appeal. Mot. for Prelim. Inj. at 2, *Oklahoma*, No. CIV-21-719 (W.D. Okla. Aug. 23, 2021), ECF No. 17.

b. Even aside from that broad unresolved question, Oklahoma builds its petition on misdirection. It tries to bluff the Court by reciting every argument any litigant has made based on *McGirt*, no matter how meritless. But again, the Court should not be fooled.

Well-settled principles, unmentioned by Oklahoma, limit *McGirt*'s civil effects. Tribal civil jurisdiction over non-Indians on fee land—the only type of land affected by reservation status—is "presumptively invalid." *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 330, 341 (2008); *Montana v. United States*, 450 U.S. 544, 565 (1981). "[W]ith one minor exception," this Court has "never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land." *Nevada v. Hicks*, 533 U.S. 353, 360 (2001). Meanwhile, States retain jurisdiction over non-Indians absent preemption under *Bracker*—which this Court has *never* applied to find preemption of state regulation on fee lands.

As for other civil consequences, Oklahoma ignores the tool *McGirt* identified for addressing them: "intergovernmental agreements," like the "hundreds" the State has "[a]lready … negotiated" on matters including "taxation, law enforcement, vehicle registration, hunting and fishing, and countless other fine regulatory questions." 140 S. Ct. at 2481. True, Oklahoma today may be unwilling to expand those agreements because it does not want to compromise its litigating position. *Supra* 23-24. But again, that is no reason to abandon *stare decisis*.

c. Even absent compacts or legislation, several of Oklahoma's "looming" questions, *Castro-Huerta* Pet. 25,

concern disputes that could only *limit McGirt*'s effects. For example, the Curtis Act conferred on municipalities "the same jurisdiction in all civil and criminal cases … as … United States commissioners in the Indian Territory." June 28, 1898, ch. 517, § 14, 30 Stat. 495. Tulsa has argued—and its municipal court has held—that this provision continues to provide "Tulsa subject matter jurisdiction over all persons, without regard to race, including Native Americans." *City of Tulsa v. Shaffer*, No. 6108204, slip op. at 10 (Tulsa Mun. Crim. Ct., Tulsa Cnty., Feb. 2, 2021), https://bit.ly/2WfaodW; *see* Tulsa Mot. to Dismiss, *Hooper v. City of Tulsa*, No. 21-cv-165 (N.D. Okla. May 26, 2021), ECF No. 6.

Oklahoma also gestures towards "[q]uestions involving … exercise of long-dormant tribal jurisdiction over civil matters." *Castro-Huerta* Pet. 25. Those "questions," however, refer to *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 214 (2005). *Sherrill* holds that even on undiminished reservation lands, "equitable considerations of laches and acquiescence" may limit tribal authorities and immunities. *Parker*, 577 U.S. at 494. *Sherrill* could eliminate, at one stroke, many potential civil consequences from *McGirt*.

d. Many of Oklahoma's other supposed civil consequences are just bogeymen that clearly will not happen. For example, the challenge to Oklahoma's "power to regulate oil and gas matters," *Castro-Huerta* Pet. 24, concerns a suit by a non-Indian oil company operating on fee land. But again, this Court has *never* found preemption of state law regulating non-Indians on fee land. *Supra* 33; *see* Okla. Corp. Comm'n's Resp. to

Petition in Error, Ex. A, *Canaan Resources X v. Calyx Energy III, LLC*, No. 119245 (Okla. Dec. 23, 2020).

As to "property taxes," *Castro-Huerta* Pet. 24, Oklahoma's own Tax Commission has given its verdict: It "does not anticipate an impact" because all reservation fee lands are "subject to ad valorem taxation." Oklahoma Tax Commission, *Report of Potential Impact of* McGirt v. Oklahoma 12-13 (Sept. 30, 2020), https://bit.ly/2Yc1YW5. The Commission saw no need to hedge, and for good reason: This Court has "held that [fee] land … [i]s subject to [state] ad valorem taxes even though it [i]s within a reservation and held by either individual Indians or a tribe." *Cass Cnty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 111 (1998).

Similarly hyperbolic are Oklahoma's claims of threats to its "regulatory primacy over environmental matters." *Castro-Huerta* Pet. 25. The "Inhofe Rider" provides that "[n]otwithstanding any other provision of law," the EPA "shall approve [Oklahoma] to administer" federal environmental laws "in Indian country"—"without any further demonstration of authority by" Oklahoma and provided only that Oklahoma's program "meets applicable legal requirements." SAFETEA-LU, Pub. L. No. 109-59, § 10211(a), 119 Stat. 1144, 1937 (2005). On October 1, 2020, EPA approved Oklahoma's request to assume that authority and found that the "statute provides EPA no discretion." Letter from Andrew R. Wheeler, EPA Administrator to the Honorable J. Kevin Stitt, at 2 (Oct. 1, 2020), https://bit.ly/3z88E4J. Today, the EPA is not "reconsidering" that decision; it has just opened a

"consultation and coordination process" with Tribes. Press Release, EPA, *EPA Announces Renewed Consultation and Coordination with Oklahoma Tribal Nations* (June 30, 2021), https://bit.ly/3kLyOWq. Unless Oklahoma explains how that process could yield a conclusion at odds with the Inhofe Rider's text, the Court should see its makeweight claims for what they are.

Oklahoma's petition descends into the bizarre with its claim that local "emergency-response dispatcher[s]" are "now ask[ing]" "callers to 911 … if they are members of a federally recognized tribe"—and if so, "transfer[ring] [them] to" tribal authorities. *Castro-Huerta* Pet. 21. To be clear: If that is happening, it is the fault of Oklahoma and its subdivisions. Nothing in *McGirt* requires (or authorizes) Oklahoma's emergency dispatchers to turn their backs on tribal citizens.

e. *McGirt* may ultimately have some real civil effects. And it is understandable that Oklahoma prefers to avoid litigating challenges, even if most lack merit. But the proper response to those concerns is the one the Oklahoma Corporation Commission has given. "Congress may explicitly authorize [the] state to exercise" contested powers, and Oklahoma "has the ability to enter into compacts with the tribes which would benefit both the State and tribal governments"—and which "[h]istorically … have been a powerful tool for facilitating cooperation." *Tax Commission Report* 3.

At minimum, the speculation and inaccuracies filling Oklahoma's petition underscore that civil consequences should be addressed in civil cases *actually presenting* them. Then the Court can consider whether *McGirt* in

fact yields those consequences and whether *Sherrill* provides a way to avoid them. Oklahoma's supposed consequences will often disappear without needing to weigh the extreme step of shoving Congress aside to overrule statutory precedent.

C. Certiorari Is Especially Unwarranted Because Oklahoma Did Not Raise Its Argument Below.

The Court should also deny because Oklahoma did not preserve its request to overrule *McGirt*. In cases from state courts, this Court reviews only questions "pressed or passed on below." *Illinois v. Gates*, 462 U.S. 213, 219-20, 222 (1983). And that remains true even when litigants argue that a "well-settled federal" rule "should be modified." *Id.* at 222. "[C]hief among" the considerations supporting that practice "is [the Court's] own need for a properly developed record." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988).

This case illustrates the point. Oklahoma seeks *McGirt*'s overruling based on claims of "disruption." *Castro-Huerta* Pet. 3-4. But because Oklahoma did not raise its argument below, the record contains no evidence to support these claims.[38] Instead, Oklahoma fills its petition with citation-free assertions from counsel. That is no way to undertake the grave task of weighing whether to abandon *stare decisis*. If Oklahoma wants this Court to entertain that request, it should develop a record in the lower courts. Even better, it should take its claims to Congress, which has the

[38] To Respondent's knowledge, the same is true of all Oklahoma's pending petitions.

institutional capacity to gather evidence and the institutional responsibility to make legislative judgments based on that evidence.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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